PD-0012-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/24/2019 4:07 PM
Accepted 6/25/2019 9:12 AM
DEANA WILLIAMSON
CLERK

No. PD-0012-19

IN THE TEXAS COURT OF CRIMINAL APPEALS
SITTING AT AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
6/25/2019
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS

V.

DWAYNE ROBERT HEATH

AN APPEAL OF A SUPPRESSION ORDER ON
APPELLEE'S PETITION FOR DISCRETIONARY REVIEW

CAUSE NO. 10-18-00187-CR
FROM THE TENTH COURT OF APPEALS

STATE'S BRIEF

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ORAL ARGUMENT REQUESTED

Identity of Parties and Counsel

Appellant	The State of Texas
Appellee	Dwayne Robert Heath
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STATEMENT REGARDING ORAL ARGUMENT

The Court has advised the parties that oral argument will be permitted, and Appellee has requested oral argument. The State also requests oral argument. The case at bar presents the ultimate question of the appropriate remedy for a claimed violation of Code of Criminal Procedure Article 39.14, as well as threshold questions which should be determined before reaching that ultimate determination. There is currently dispute as to these issues, and several cases on this topic are currently under review in this Court and the intermediate courts of appeal. The State believes that oral argument will assist the Court in drawing a clear understanding of the issues presented for the Court's determination.

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Issues Presented

The Court has granted discretionary review of the three issues presented in Appellee's petition: 1) Whether the Court of Appeals erred in reversing the trial court's discovery sanction order under a theory not raised by the State; 2) Whether Appellee's discovery request was sufficient under Code of Criminal Procedure Article 39.14 (the Michael Morton Act); and 3) Whether the State is estopped from challenging the sufficiency of Appellee's discovery request because it produced discovery in response to the request.

Statement of the Case

Appellee moved to suppress evidence on the basis of a violation of Code of Criminal Procedure Article 39.14. There was no showing that the evidence was obtained illegally, or that the prosecution acted willfully in failing to provide discovery. The trial court granted the motion to suppress. On appeal to the Tenth Court of Appeals, the State asserted that the trial court abused its discretion by ordering suppression, as opposed to granting a continuance. In overturning the trial court's suppression order, the Tenth Court of Appeals determined that Appellee's discovery request was not sufficient to provide notice to the State, a theory not presented in the trial court, or on appeal.

Statement of Facts

Pretrial

Appellee was charged by indictment with the State Jail Felony of Injury to a Child, alleged to have been committed on or about November 5, 2016. (CR I – 5). The indictment was returned February 15, 2017. (CR I – 5). Counsel was appointed on March 17, 2017. (CR I – 16). Appellee entered his Waiver of Arraignment on March 23, 2017. (CR I – 19). On September 29, 2017, Appellee filed Defendant's Motion to Disclose Records of Texas Department of Family and Protective Services. (CR I – 28-29). On January 19, 2018, the State moved to amend the indictment by adding the culpable mental state of criminal negligence. (CR I – 32-34, 41). On February 9, 2018, Appellee failed to appear, whereupon his bond was forfeited and a capias issued for his re-arrest. (CR I – 36-39). On May 11, 2018, the State presented its Combined Notices, which included a State's Witness List, Notice of State's Experts and Notice of Intent to Use. (CR I – 44-46).

Writ for Habeas Corpus and Motion to Suppress Illegally Withheld Evidence

On May 25, 2018, Appellee filed his Writ for Habeas Corpus and Motion to Suppress Illegally Withheld Evidence. (CR I – 47-55). Appellee moved to exclude an audio recording of a 9-1-1 call, which was not made available to the defense until May 23, 2018; and any testimony relating to statements preserved on the recording. (CR I – 47). In support of the

requested relief, Appellee recited case events that had occurred between the commission date of the alleged offense and when the prosecutor learned of the existence of the 9-1-1 recording. (CR I – 47-49). Appellee argued that Code of Criminal Procedure article 39.14 required the State to produce discovery "as soon as practicable; that the recording had been "improperly withheld;" and that the recording and any fruits of the recording had been "illegally withheld" in violation of the 6th and 14th Amendments, as interpreted in *Mapp v. Ohio,* 367 U.S. 643 (1961) and *Wong Sun v. United States,* 371 U.S. 471 (1963). (CR I – 50).

Appended to the motion were email printouts reflecting a request for discovery on March 23, 2017; and a notification to pick up supplemental discovery on May 23, 2018. (CR I – 53, 55).

Hearing on Motion

Hearing was had on Appellee's Writ of Habeas Corpus and Motion to Exclude Evidence on May 29, 2018. (RR I – 6). Appellee prefaced his argument with the assertion that there was "currently no case law or any Court of Appeals decision on what exactly [the] remedy is" for a violation of Article 39.14, Code of Criminal Procedure.[1] Appellee explained that he had received discovery of a recorded 9-1-1 call the previous Wednesday; "I filed this this motion because I had requested discovery… some 14 months ago." (RR I – 6). The recording had not been provided until six days prior

[1] Appellee refers to Article 39.14 as the "Michael Morton Act," a term applicable only to the 2013 amendments to the Article.

to trial. (RR I – 7). Equating Article 39.14 with the requirements of civil discovery, Appellee opined that the purpose of the article was to "prevent surprise so that the defendant can have a fair game. I'm not asking for a continuance…. I'm asking that the Court exclude the evidence at a minimum." (RR I – 8).

The State's attorney explained that she had not known about the 9-1-1 call until she learned of it while interviewing a witness the week before. (RR I – 8). The police report noted only that a deputy had responded to a call for service. (RR I – 8). When the witness mentioned that a 9-1-1 call had been made, the prosecutor got a recording of the call and provided it to the defense on the same day the Sheriff's office provided it the District Attorney's office. (RR I – 8). There was nothing suggesting bad faith on the part of the prosecution, and no showing that the evidence had been illegally obtained. (RR I – 8-9). Accordingly, exclusion of the evidence was not proper; rather, "the remedy should be more time, but not to have the State present a case that's incomplete." (RR I – 9).

Appellee affirmed that "I'm not requesting more time," and was "not alleging bad faith on behalf of the prosecutors." (RR I – 9).

Appellee agreed with the court's understanding that his argument "'really goes to the directive in [Article 39.14] that says, "as soon as practicable," correct?'" (RR I – 10). Appellee's research had not revealed any authority defining "as soon as practicable," but contended that "it's not 14 months and three past jury trial settings." (RR I – 10).

The State proposed that "as soon as practicable" meant "as soon as the State prosecutors become aware of the evidence and obtaining it as soon as we possibly could and handing it over." (RR I – 10). The State argued that a prosecutor had no duty to hand over an item of evidence until they in fact know of its existence; "[a]nd the moment we found out it existed and was still available, we handed it over. So I would think that is as soon as practicable." (RR I – 10-11).

Appellee agreed that the prosecutors didn't have the recording until the day it was provided to the defense. (RR I – 11). However, he argued that "the State," by definition, included Sheriff's office dispatchers; ergo "the State" had had the evidence since November 5, 2016. (RR I – 11). Since the "sheriff's office dispatch doesn't even mention a thing to their attorneys about a 9-1-1 call until six days before this man is set for trial, almost two years after the incident, I believe the remedy is at a minimum exclusion." (RR I – 11-12).

The prosecutor briefly described the roles of the dispatcher, the responding officer, and the detective, explaining how it could occur that the 9-1-1 call had been missed. (RR I – 12). It was then suggested that "if this Court wants to – to kind of follow the logic of what the defense attorney is saying, that the sheriff's office should have known to turn all of this over and if the remedy is exclusion, that the State should be allowed to appeal this pretrial decision as a – as a motion to Suppress, which is what it really is." (RR I – 12-13). "But I think to put this kind of burden on

dispatch or the detective when they had no way of knowing it from this record either, I think that we would need further clarification of that if the Court is so moved to exclude it." (RR I – 13).

The trial court decided that "[w]hile the Court of Appeals will have months to make up their mind about how to make a decision on this matter, I've got a panel waiting in the hallway and so – so I am going to – I'm going to grant the request of exclusion at this time." (RR I – 14). The trial court entered a written order to this effect. (CR I – 73).

Findings of Fact and Conclusions of Law

Pursuant to the State's Motion to the Trial Court to Enter Essential Findings (CR I – 74-76), the trial court entered Findings of Fact and Conclusions of Law. (CR I – 86-90).

The court found that a 9-1-1 recording had been made contemporaneously with the alleged commission of the offense, and that this recording had been maintained by law enforcement since. (CR I – 86). The court reiterated the course of events throughout the litigation, noting that the District Attorney's office was unaware of the existence of the recording before May 18, 2018. (CR I – 86-88). The court found that the District Attorney's office first became aware of the existence of the recording through a witness meeting on May 18, 2018, and promptly requested a copy of the recording from the Sheriff's office. (CR I – 88). The District Attorney's office notified and provided a copy of the recording to defense counsel on or about May 23, 2018. (CR I – 88). The court heard

Appellee's motion to suppress on May 29, 2018, prior to commencement of voir dire. (CR I – 88).

The court noted the requirement of Article 39.14 that "as soon as practicable" after receiving a request for discovery, the state is to produce material evidence. (CR I – 88). The court found that, upon receiving Appellee's discovery request on March 20, 2017, the District Attorney was under a "specific duty" to ascertain what discoverable evidence was held by the Sheriff's office and to disclose it "as soon as practicable." (CR I – 89). The court found that, under the facts of the case, the District Attorney office's failure to disclose the 9-1-1 recording until the week before trial constituted a violation of the "plain language" of Article 39.14. (CR I – 89). Because the District Attorney's office failed to comply with Article 39.14(a), the recording was excluded from evidence. (CR I – 90).

State's Appeal

On June 5, 2018, the State filed its Notice of Appeal with the Tenth Court of Appeals. In its brief to the Tenth Court, the State characterized its sole issue as, "[t]he trial court misapplied the remedy of suppression for a violation of Code of Criminal Procedure Article 39.14, where there was no showing of a willful violation by the State, and the appropriate remedy would have been the granting of a continuance."

Court of Appeals' Opinion

The Tenth Court of Appeals issued its Opinion on October 31, 2018. *State v. Heath*, No. 10-18-00187-CR, 2018 WL 5660945 (Tex. App. – Waco

Oct. 31, 2018, *pet. granted*). In addressing the issue posed by the State, the Tenth Court noted that Appellee's discovery request was not an "order" as contemplated by prior versions of article 39.14; nevertheless, it found that "the same standard of review applies to requests made pursuant to the amended article 39.14(a)." *Id.* at *1. The Court provided no analytical underpinnings as to why it made this conclusion. In applying this standard, the Court determined that Appellee's discovery request "did not even reference article 39.14(a) and did not designate any items sought to be produced." *Id.* at *2. As the request was insufficient to put the State on notice as to what was being requested, the State was therefore under no duty to produce the 9-1-1 recording. *Id.* Accordingly the Court found that the trial court abused its discretion in ordering exclusion "on this basis." *Id.*

Petition for Discretionary Review

Appellant sought discretionary review on three questions: 1) Whether the Court of Appeals erred by reversing the trial court under a theory not raised by the State; 2) Whether Appellee's discovery request was sufficient under article 39.14; and 3) Whether the State is estopped from challenging the sufficiency of a discovery request when it produces discovery in response to the request. This Court granted review on all three issues.

Summary of Argument

In determining the issues at bar, this Court should first address a threshold question of what, if any, remedy can be applied to a perceived non-compliance with a discovery request made pursuant to article 39.14(a).

In determining whether the Court of Appeals erred by reversing the trial court under a theory not raised by the State, the Court should determine whether the Court of Appeals was within its discretion to do so pursuant to Rules of Appellate Procedure 33.1(a) and 38.1(f).

In determining whether a discovery request is sufficient under article 39.14(a), the subjective understanding and intent of the parties should be considered.

The theory of estoppel is inapplicable to an appellate court's determination of an issue when the appellate court exercises its discretion pursuant to Rules of Appellate Procedure 33.1(a) and 38.1(f).

In a case where there was no showing that evidence was obtained illegally, or that the prosecution acted willfully in failing to provide discovery, this Court should render its judgment finding that the trial court abused its discretion in ordering the evidence be suppressed.

Threshold Question

Although not addressed in the petition for discretionary review, it appears this Court should address a preliminary question of what, if any, remedy can be applied to non-compliance with a discovery request made pursuant to article 39.14(a).

A History of Article 39.14

Prior to its 2013 amendments, Code of Criminal Procedure Article 39.14 provided that, upon a showing of good cause, a trial court was required to order the State to provide discovery to the defense. *Tex. Code Crim. Proc.* art. 39.14 (West 2009). The court was required in its order to specify the time, place and manner in which discovery would be provided. *Id.* The 2013 amendments eliminated the role of the trial court as an overseer of discovery, instead leaving it to the defense to request discovery from the State directly, and requiring the State to provide discovery in kind "as soon as practicable." *Tex. Code Crim. Proc.* art. 39.14 (West 2017). Never has the text of Article 39.14 included a remedy for a violation of its provisions.

Prior to amendment, the standards and remedies applicable to Article 39.14 were well-established. The 2013 amendment, intended to streamline the discovery process, did not change the standard of review or create a new hierarchy of remedy for violations of the statute.

Standard of Review

When reviewing a trial judge's decision to admit or exclude evidence, an appellate court must determine whether the judge's decision was an abuse of discretion. *Martinez v. State*, 867 S.W. 2d 30, 39 (Tex. Crim. App. 1993). Unless the trial judge's decision was outside the "zone of reasonable

disagreement," an appellate court should uphold the ruling. *Montgomery v. State,* 810 S.W. 2d 372, 391 (Tex. Crim. App. 1991). When a trial judge makes findings of fact "based on an evaluation of credibility and demeanor," an "appellate court should show almost total deference" to those findings. *Guzman v. State,* 955 S.W. 2d 85, 89 (Tex. Crim. App. 1997).

Prior to the 2013 amendment, an analytical framework and hierarchy of remedies had been established regarding violations of a trial court's discovery order issued under article 39.14. Evidence willfully withheld from disclosure under such a discovery order should be excluded from evidence. *Hollowell v. State,* 571 S.W. 2d 179, 180 (Tex. Crim. App. 1978); *State v. LaRue*, 152 S.W. 3d 95 (Tex. Crim. App. 2004); *Oprean v. State*, 201 S.W. 3d 724, (Tex. Crim. App. 2006). But even in cases where the State made "grievous errors and mistakes" but there was no evidence that the prosecutor had acted with the specific purpose of disobeying the court's discovery order, preventing the defense from preparing its case, or denying the defendant his constitutional rights to a speedy trial or effective assistance of counsel, this Court had held that a trial court erred in ordering exclusion of the evidence; the proper resolution in such an event was a continuance of the trial. *Larue* at 99-100.

While the 2013 amendments made key changes to article 39.14, none of them reflected a change in this analytical framework, nor in the established hierarchy of remedies for violations. A notable change was the elimination of the trial court's involvement in the discovery process. *Tex. Code Crim.*

Proc. art. 39.14(a) (West 2017). Previously, the defendant was required to seek a court order on good cause to avail himself of discovery. *Tex. Code Crim. Proc.* art. 39.14(a) (West 2009). The trial court then entered its order specifying the time, place and manner in which discovery would be accomplished. *Id.* By reducing the trial court's role in the discovery process to that of an after-the-fact arbitrator, the 2013 amendments in effect introduced a post-hoc subjectivity test to a range of issues involved in that process. The problems inherent in this approach have been revealed in the opinion below, as well as other intermediate appellate interpretations of the revised statute. These include interpretations of "materiality" (*Watkins v. State*, 554 S.W. 3d 819, 820–22 (Tex. App. – Waco 2018, *pet. granted* Dec. 5, 2018); and whether a discovery request is sufficient to provide notice (*Davy v. State*, 525 S.W. 3d 745 (Tex. App. – Amarillo 2017, *pet. ref'd*). When the discovery process was subject to an order of the trial court, such subjective considerations and definitions were tailored to the specific facts and circumstances of the case at bar, within the trial judge's discretion.

The inference gleaned from *Hollowell, LaRue,* and *Oprean* was that discovery orders issued by a trial court under the previous version of Article 39.14 were enforceable by the trial court under the inherent authority of that court to enforce its own orders. *See Oprean* at 729 (Cochran, J. concurring). Although theoretically facilitating and enlarging a defendant's access to discovery, the 2013 amendments appear to have

created a paradox by eliminating the legal basis by which these new realms of discovery are enforceable: the authority of a trial court to enforce its own orders. And contrary to the idea espoused by some defense practitioners, that the 2013 amendments call for harsher consequences against the State for violations of a discovery request, a sounder argument could be made that the 2013 amendments actually foreclosed the means of enforcement by eliminating the court order requirement.

The State does not here suggest such an interpretation.[2] But it would appear that a decision by this Court approving a particular remedy applicable to the State's violation of a discovery request, when the Legislature has not prescribed any remedy, would require at least some degree of proaction; whether it be continuing the hierarchy of remedies set out in *LaRue* and *Oprean* without the benefit of a court order, or grafting on the more draconian penalties from civil law (still without a court order) which have been suggested by some pundits.

Since the amended version of 39.14 came into effect in 2014, intermediate court opinions interpreting the statute have not generally sought to sweep away the earlier precedents, but rather have sought to give them effect in light of the amendment. The State proposes that in enacting the 2013 amendment without addressing any new enforcement

[2] Although such a stance would not necessarily eliminate a defendant's ability to obtain a sanction for a discovery violation. The State would still be under a constitutional duty to provide *Brady* material, and a discovery order could still be sought apart from Art. 39.14 under a similar due process theory.

remedies, the Legislature did not change the standard of review or create a new hierarchy of remedies for violations of the statute.

Issue One: Whether the Court of Appeals Erred in Reversing the Trial Court's Discovery Sanction Order Under a Theory Not Raised by the State

In his first issue, Appellee asserts that the Court of Appeals erred in deciding the case under a theory not raised by the State at hearing or on appeal. Although not specifically stated in its opinion, it appears the Court of Appeals relied on Rules of Appellate Procedure 33.1(a) and 38.1(f) in reaching its decision. *Heath* at *2.

Rule of Appellate Procedure 33.1(a) provides:

> *In general.* As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) The complaint was made to the trial court by a timely request, objection, or motion that:
>
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
>
> (B) complied with the requirements of the Texas Rules of Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
>
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

Tex. R. App. P. 33.1(a). Preservation of error is a systemic requirement that a first-level appellate court should ordinarily review on its own motion. *Jones v. State,* 942 S.W. 2d 1, 2 n. 1 (Tex. Crim. App. 1997).

Rule 38.1(f) provides that "[t]he statement of an issue or point [raised on appeal] will be treated as covering every subsidiary question that is fairly included." *Tex. R. App. P.* 38.1(f).

Competing Equities

This appears to be a competing equity with this Court's precedence that it violates "ordinary notions of procedural default" for a court of appeals to reverse a trial court's decision on a legal theory that the complaining party did not present to the trial court. *Hailey v. State,* 87 S.W. 3d 118, 122 (Tex. Crim. App. 2002) (citing *State v. Mercado,* 972 S.W. 2d 75, 77–78 (Tex. Crim. App. 1998)). This Court accordingly established that an appellate court may not reverse a trial court "on a theory that the trial court did not have the opportunity to rule upon and upon which the non-appealing party did not have an opportunity to develop a complete factual record." *Hailey* at 122 (citing *Posey v. State,* 966 S.W. 2d 57, 62 (Tex. Crim. App. 1998)). Also, the Court has established that it is improper for an appellate court to reverse a case on a theory not raised at trial or on appeal. *Hailey* at 118; *Gerron v. State,* 97 S.W. 3d 597 (Tex. Crim. App. 2003).

Discussion

On direct appeal, the issue presented was whether the trial court abused its discretion by excluding the 9-1-1 recording. *Heath* at *1. It

appears that the Tenth Court first addressed its *sua sponte* duty to determine whether Appellee had even properly preserved a complaint by making a sufficient discovery request. Even were this requirement not considered, Rule 38.1(f) would indicate that the sufficiency of Appellee's discovery request was subsumed as a subsidiary question fairly included in determining whether the trial court had abused discretion.[3]

It appears then that the issue is not whether the State raised the issue of sufficiency of notice, but whether the Court of Appeals properly considered the issue either as a *sua sponte* question of error preservation, or as a subsidiary question of whether the trial court abused its discretion in suppressing the 9-1-1 recording. However, it is not necessary for this Court to reach a conclusion on this point to ultimately decide the case at bar. The State takes the position that if the Court of Appeals' implicit reliance on either Rule 33.1(a) or 38.1(f) was proper; its reasoning, for reasons discussed below, was incorrect; nevertheless, the Tenth Court's ultimate holding that the trial court abused discretion in suppressing the evidence was correct.

Issue Two: Whether Appellee's Discovery Request was Sufficient Under Article 39.14

In his second issue, Appellee proposes that his discovery request was sufficient to provide notice to the State, under Code of Criminal Procedure

[3] In *Green v. State,* No. 10-14-00161-CR, 2015 WL 9462134 (Tex. App. – Waco Dec. 23, 2015), the Tenth Court explicitly relied on Rule 38.1(f) to address an issue of ineffective assistance of counsel. In reversing that decision, this Court opted not to address whether the Tenth Court's reliance on 38.1(f) was appropriate. *Green v. State,* No. PD-0171-16, 2017 WL 1089937 (Tex. Crim. App. Mar. 22, 2017).

Article 39.14. The record reflects that neither the parties nor the trial court addressed the sufficiency of Appellee's discovery request; the issue presented, argued, and ruled on was an adequate remedy. Nor did the parties on appeal address the sufficiency of the discovery request vis a vis Rule 33.1(a)'s preservation requirement. Neither this fact, nor the fact that the State provided discovery is dispositive of whether the discovery request was sufficient or whether error was properly preserved.

There may be a number of reasons the State might provide discovery, aside from receipt of what a defendant might consider a "sufficient" discovery request. Among these are a general compliance with the requirements of *Brady,* without reference to the materiality or exculpatory nature of the information disclosed, *Brady v. Maryland,* 373 US. 83 (1963); the prosecutor's ethical obligations under Texas Rule of Professional Conduct Rule 3.09(d); and the prosecutor's primary duty to see that justice is done, *Tex. R. Crim. Proc.* art 2.01. A prosecutor's decisions to act for any of these reasons does not waive or preserve anything, nor render a discovery request sufficient.

The point of contention that the State focused on in the trial court was the proper remedy for the situation, as dictated by earlier analyses of 39.14 and by a general concern for fair play; not a hyper technical interpretation of the preservation rules. The State maintains that while the result reached by the Tenth Court was ultimately correct, its focus on preservation rather than remedy was incorrect. A more proper approach, considering that a

discovery request is now an arms-length transaction between the parties, would be to consider the subjective understanding of the parties. There are analogous situations that would assist the Court in developing analytical guidelines for such situations.

One analogous situation is actually found in interpretations of how error is preserved through objection under Rule 33.1(a). As noted, to preserve an issue for appellate review, a timely and specific objection is required. *Tex. R. App. P.* 33.1(a)(1)(A); *Tex.R. Evid.* 103(a)(1); *Gillenwaters v. State,* 205 S.W. 3d 534, 537 (Tex. Crim. App. 2006). A specific objection is necessary to inform the trial judge of the issue and basis of the objection, and to allow the judge a chance to rule on the issue at hand. *Neal v. State,* 150 S.W. 3d 169, 178 (Tex. Crim. App. 2004). But "all the party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Lankston v. State,* 827 S.W. 2d 907, 909 (Tex. Crim. App. 1992). Beyond this, there are no specific words or technical considerations required for an objection to ensure that the issue will be preserved for appeal. *Id.* If the correct ground of exclusion was apparent to the judge and opposing counsel, no waiver results from a "general or imprecise objection." *Id.* This Court has cautioned appellate courts to "not be hyper-technical in examination of whether error was preserved." *Archie v. State,* 221 S.W. 3d 695, 698 (Tex. Crim. App. 2007).

Applying the analogy to the amended article 39.14, if it is clear that the trial court and the parties understood what was being discussed (or at least declined to argue the point), an appellate court should be cautious not to apply a "hyper-technical" post-hoc analysis to suggest otherwise.

Another analogous situation is the interpretation of plea agreements. As the Court observed in *Williams v. State*, 502 S.W. 3d 168 (Tex. Crim. App. 2016):

> A plea agreement is a contract between the State and the defendant. We look to the written agreement and the formal record to determine the terms of a plea agreement, and we apply general contract-law principles to interpret a plea agreement. The interpretation of a contract begins with the text and requires that undefined words be given their plain, ordinary, and generally accepted meanings absent some indication of a different intent. Extrinsic evidence may be considered only to interpret an ambiguous contract, not to create an ambiguity not apparent from the contract's text. A contract is ambiguous only if it is subject to more than one reasonable interpretation, and ambiguity cannot be created merely because a party can point to words or phrases that, read in isolation, would favor multiple interpretations, nor is ambiguity created merely because some language, when viewed through the lens of hindsight, could have been more clearly stated.

Williams at 170–71 (internal citations omitted).

Applying the 'plea bargain' analogy to the case at bar, to the degree the Waco court reached out to find ambiguity in the parties' understanding of the discovery request, it failed to give due consideration to the purpose behind the amended article 39.14. To give substance to the Legislature's intent to encourage openness in discovery, any analytical framework that

seeks to interpret the sufficiency of a discovery request should give weight to the understandings of the parties.

Issue Three: Whether the State is Estopped from Challenging the Sufficiency of the Discovery Request

In his third issue, Appellee proposes that the State is estopped from challenging the sufficiency of Appellee's discovery request because it produced discovery in response to the request. As noted above, nothing precludes the State from providing discovery to a defendant, and nothing in the record of this case is conclusive as to why the State provided discovery. To the extent argued in the trial and appellate court, the State's position has been and remains that provision of the 9-1-1 recording was in accordance with the discovery request, and the State should not have been punished for providing the discovery in good faith.

The Court of Appeals decided that Appellee's discovery request was insufficient under article 39.14 to provide the State notice. Neither in the trial court, nor on direct appeal, nor in this review, has the State taken a position on this point, much less relied on it. It is therefore unnecessary for this Court to address an issue of estoppel that the State has not, and is not now, asserting; but rather has its source in the Court of Appeals reliance on Rules of Appellate Procedure 33.1(a) and/or 38.1(f).

In essence, Appellee's third issue is a reiteration of his first issue, whether the Court of Appeals improperly relied on these Rules of Appellate Procedure to consider the sufficiency of the discovery request.

Appropriate Standard of Review

In a case where there was no showing that evidence was obtained illegally, or that the prosecution acted willfully in failing to provide discovery, this Court should render its judgment finding that the trial court abused its discretion in ordering the evidence be suppressed.

In his second issue, Appellee urges the Court to address whether the discovery request was sufficient to provide notice, under article 39.14. *Appellee's Brief* at 22. He asserts that "the issue presented impacts literally every pending criminal case in the State of Texas." *Id.* The State not only concurs in this assessment and request, but would also urge the Court to address the proper hierarchy of remedies. The gravity of these questions, and their universal effect throughout the State further suggests that this Court should render an opinion on the merits.

This Court's Authority Under Judicial Economy

In its capacity as a discretionary review court, this Court reviews "decisions" of the courts of appeals. *E.g.*, *Benavidez v. State*, 323 S.W. 3d 179, 183 & n. 20 (Tex. Crim. App. 2010); *Zuliani v. State*, 353 S.W. 3d 872 (Tex. Crim. App. 2011); *Fuller v. State*, 363 S.W. 3d 583, 589 n. 30 (Tex. Crim. App. 2012). The Court has made exceptions to this practice, "and when the proper resolution of the remaining issue is clear, we will sometimes dispose of the case in the name of judicial economy." *Davison v. State*, 405 S.W. 3d 682, 692 (Tex. Crim. App. 2013) (citing *Johnston v. State,* 145 S.W. 3d 215, 224 (Tex. Crim. App. 2004)).

In explaining its reliance on this exception in *Davison,* the Court noted that "[t]he court of appeals did not determine in its opinion whether *Boykin* error actually occurred in this case, pretermitting that analysis with its faulty conclusions that any such error was forfeited and, in any event, harmless under Rule 44.2(b). Ordinarily, we would remand a cause to the lower appellate court when our rejection of its basis for disposition gives rise to another "issue [that was] raised and [now becomes] necessary to final disposition of the appeal[,]"but which the court of appeals has not already addressed…." *Davison* at 692 (citing *Tex. Rule App. P.* 47.1).

In *Smith v. State*, 463 S.W. 3d 890 (Tex. Crim. App. 2015), the Court invoked its reasoning in *Davison* to dispose of the case in the interest of judicial economy "if the proper solution of the issue is clear." *Davison* at 691–692. The Court noted that although the factual contexts of the two cases differed, the bottom line was that the Court's rejection of the court of appeals' basis for disposition gave rise to another issue that was necessary to the appeal's disposition but which the appellate court had not already addressed. *Smith* at 894-895.

State v. Cortez, 543 S.W.3d 198 (Tex. Crim. App. 2018), was a case that had already been vetted twice by the court of appeals. The Court recognized the case as exceptional, "where, in the name of judicial economy, we are able to, and will, dispose of the case. *Id.* at 200. The Court noted that the trial court thoroughly covered in its written Findings of Fact and Conclusions of Law the factual and legal issues related to the

traffic stop under consideration. *Id.* at 201. The State had challenged the trial court's entire decision on appeal, briefed all of the issues before the court of appeals, and the court of appeals had twice upheld the trial court's suppression order. *Id.*

The Court has thus established precedent for rendering an opinion in the interest of judicial economy. Since the article 39.14 amendment became effective in 2014, the courts of appeal have endeavored to interpret the changes in light of precedent. Unfortunately, the lower court opinions have tended to neglect the purpose of the amendment, which is to ensure open and wide-ranging discovery. As noted by Appellee, article 39.14 affects the discovery process in practically every criminal prosecution in the State, and parties and practitioners have been struggling to make sense of the piecemeal interpretations provided by the courts of appeal. If the Court defers making an ultimate ruling in the case at bar, at minimum it needs to establish straightforward analytical and remedial standards to facilitate the discovery process.

Court of Appeals Interpretations

In *Davy v. State*, 525 S.W. 3d 745 (Tex. App. – Amarillo 2017, *pet. ref'd*), the Seventh Court of Appeals was asked to decide whether the trial court abused its discretion by admitting punishment evidence not produced by the State, in violation of an article 39.14 discovery request. *Id.* at 749. The Amarillo Court noted the Fourteenth Court of Appeals' observation in *Glover v. State*, 496 S.W. 3d 812, 815 (Tex. App. – Houston [14th Dist.] 2016,

pet. ref'd), that the disclosure requirements described in article 39.14(a) "are triggered only after receiving a timely request from the defendant." *Id.* It also noted that by its 2013 amendments, the Legislature retained in article 39.14(a) the concept that discovery applies to items "designated." *Davy* at 750. Since the record didn't contain a copy of the defendant's discovery request, the Court had no basis for determining whether any request met the requisites of 39.14 and thus could not determine an abuse of discretion. *Id.* at 750-751.

Other courts have cited *Davy*'s clarification of 39.14's specificity requirements in properly finding fault with defendants' discovery requests and/or preservation. *See, e.g., Horne v. State*, 554 S.W.3d 809, 813–15 (Tex. App. – Waco 2018, *pet. ref'd*); *Perez Hernandez v. State*, No. 13-16-00696-CR, 2019 WL 2127895, at *16–17 (Tex. App. – Corpus Christi-Edinburg May 16, 2019).

In the case at bar, the Waco Court of Appeals extended this post-hoc analytical scheme to conclude that Appellee's failure to "designate" discoverable items in accordance with 39.14's specificity requirements absolved the State of any duty to produce discovery. *See, Heath* at *2. Similarly, the Waco Court in *Watkins* found a post-hoc analytical basis in the definition of "materiality" to reject a defendant's 39.14 claim. *Watkins v. State*, 554 S.W. 3d 819, 820–22 (Tex. App. – Waco 2018, *pet. granted* Dec. 5, 2018).

While a trend seems to be developing in the courts of appeal to apply inflexible preservation standards on defendants' 39.14 discovery requests, the case at bar reveals an equally disturbing trend among trial courts to impose the harshest of sanctions for the State's violation of the statute, regardless of any showing of bad faith by the prosecutor. Rather than allow these trends to continue, this Court should address these universal concerns rather than remand to the Tenth Court of Appeals. The record is before the Court and the parties have briefed the issues below, allowing the Court to do so.

Conclusion

The trial court abused its discretion in ordering suppression of relevant evidence. In doing so, it ignored well-established precedent requiring a showing of willfulness by the prosecutor before the sanction of suppression is entertained. There was no showing or even a suggestion that the prosecutor in this case acted willfully in failing to disclose the 9-1-1 recording. On the contrary, the evidence affirmatively showed that the prosecutor moved swiftly to provide the discovery to the defense as soon as she became aware of its existence.

The Court of Appeals, though ultimately reaching the proper conclusion that the trial court abused its discretion, applied an improper post-hoc analysis to do so: finding the Appellee's discovery request to be insufficient under article 39.14 to without evaluating the parties' subjective

understanding of the discovery request and the degree to which the State's provision of discovery was related to the discovery request.

Prayer

For the foregoing reasons, the State of Texas prays that this Honorable Court exercise its authority in the interest of judicial economy and render its decision affirming the Court of Appeals, yet rejecting its analytical approach; in the alternative the State prays this Honorable Court to reverse the decision of the Court of Appeals, and remand for further proceedings in accordance with an analytical and remedial framework which recognizes the legislative purposes of open discovery policies embodied in Code of Criminal Procedure article 39.14.

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Certificate of Service

I certify that I caused to be served a true and correct copy of this State's Brief by E-Filing Service on Appellee's attorney of record, E. Alan Bennett at abennett@slm.law; and on the State Prosecuting Attorney at information@spa.gov.

DATE: 6/24/18

/S/ STERLING HARMON_____

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